

AIR WAR COLLEGE

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DRONE WARFARE: IS THE UNITED STATES VIOLATING THE
LAW OF ARMED CONFLICT?

by

Barbara E. Shestko, Col, USAF

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Biography

Barbara E. Shestko is a Colonel and Judge Advocate in the United States Air Force. She has served as a prosecutor, defense attorney, civil litigation attorney, staff judge advocate and military judge. She also served in the United States Army as a military police officer. Colonel Shestko received her LL.M. from George Washington University School of Law in 2000; a Juris Doctor from University of South Carolina School of Law in 1991; and a Bachelor's of Science Degree from University of North Carolina at Charlotte in 1988. She is currently a student at the Air War College, Maxwell Air Force Base, Alabama.

Introduction

The United States has become increasingly dependent upon the use of unmanned aircraft systems (UASs) or “drones” to kill targeted members of al-Qaeda and the Taliban.¹ Due to the success of drone warfare, we can expect the United States to continue its current missions and eventually expand the use of drones to other areas. Drones have become the weapon of choice due to environmental complexities in which the United States must fight its current global operations. This environment, once described as irregular warfare, is now referred to as hybrid warfare. Hybrid warfare is our nation’s newest buzzword in what was once referred to as the Global War on Terror (GWOT).² As the complexities of this war increased, it became apparent that we could not achieve our objectives if we employed the same strategies of previous conflicts. The law of armed conflict supports the current operation of drones when conducted by combatants, i.e. members of the United States military. The legality of these drone operations when conducted by the Central Intelligence Agency (CIA) is controversial primarily because of the noncombatant status of the CIA operatives. In both instances, however, drone warfare satisfies the principles of discrimination and proportionality of the just war doctrine. Furthermore, it is the position of this paper that the CIA under specific circumstances can legally conduct these drone operations against members of al-Qaeda and the Taliban. These circumstances include situations where the targets are engaging in direct hostilities and apprehension through international law enforcement methods is not possible. The President of the United States or a specific combatant commander to whom the President delegated his approval authority must approve these CIA operations.

¹ This paper is based upon open source materials and media accounts of the United States military and Central Intelligence Agency’s involvement in these operations. For the purposes of this paper, the media accounts are assumed factually accurate.

² Scott Wilson & Al Kamen, “‘Global War on Terror’ is Given New Name,” WASH. POST, Mar. 25, 2009: GWOT was renamed “Overseas Contingency Operations.” For a detailed discussion on hybrid warfare *see* David Kilcullen, *The Accidental Guerrilla*, (New York: Oxford University Press, 2009), 4-6, 25, 148-54.

Unmanned Aircraft Systems (UASs)

Historical Perspective

UASs for intelligence, surveillance, and reconnaissance (ISR) is currently the preferred term by the Department of Defense for unmanned aerial vehicles (UAVs) and remotely piloted aircraft (RPA). In discussing this aircraft system, this paper uses all three terms depending upon the context. During the early 1900's the United States was working on primitive UAS technology. Nazi Germany first demonstrated the formidable threat an unmanned aerial vehicle could pose during combat. The success of the Nazi V-1 program paved the way for the American post-war UAV program.³ During the Vietnam conflict, the Firebee UAVs became popular for stealth surveillance. The United States shared this technology with the Israelis who returned the favor by building the next generation of UAVs known as the Scout and Pioneer. The United States then procured the Pioneer from the Israelis and deployed several of them during the Gulf War.⁴ By 1994, the United States had developed the RQ-1 Predator system. The Predator is a long-endurance, medium-altitude unmanned aircraft system for surveillance and reconnaissance missions. The Predator distributes surveillance imagery in real-time from synthetic aperture radar (SAR) simultaneously to the operator, the battlefield, and the operational commander via satellite communication links.⁵

Approximately, ten years later, the MQ-1 Predator, the multi-role version of the RQ-1 model, was operational. Armed with AGM-114 Hellfire missiles, the MQ-1 conducts both

³ NOVA, "Spies that Fly: A New Generation of Pilotless Planes Fly, Spy and Bomb in Places too Risky for Human Pilots," <http://www.howstuffworks.com/framed.htm?parent=reaper.htm&url=http://www.pbs.org/wgbh/nova/spiesfly/uavs>. Accessed last 17 October 2010.

⁴ Ibid.

⁵ <http://www.airforce-technology.com/projects/predator/Predator> (last accessed 17 October 2010).

armed reconnaissance and interdiction.⁶ The most current weapon system is the MQ-9 Reaper. In March 2007, the first MQ-9 squadron, the 42nd Attack Squadron, stood up at Creech Air Force Base in Nevada. The MQ-9 has an operational ceiling of 50,000 feet with a maximum internal payload of 800 pounds and external payload over 3,000 pounds. It has the capability to carry up to four Hellfire II anti-armor missiles, two laser-guided bombs and one 500-pound GBU-38 JDAM (joint direct attack munition).⁷ In 2001, the armed forces had approximately 100 UAVs in their inventory and now this number has grown to more than 5,000.⁸ This estimation includes all types of UAVs. The number of Predator/Reaper type aircraft has increased less drastically. A rough estimate of the current inventory is approximately 40-50 active Reapers and 150-200 Predators.⁹

Factors Contributing to Increased Reliance after 9/11

The dominance of the United States military in conventional warfare gave adversaries, particularly non-state actors and their state sponsors, strong motivation to implement asymmetric methods in order to deny our advantages.¹⁰ One strategy, referred to as “lawfare,”¹¹ is their ability to use law of armed conflict against us to include staging “collateral damage” sites for the media after an air strike. Whether the air strike or the insurgents caused the unfortunate deaths of the women and children portrayed in the photos, the harm is enormous. Adversaries unable to *symmetrically* counter U.S. military capabilities, especially airpower, seize upon lawfare.¹² The

⁶ Ibid.

⁷ Ibid.

⁸ Armin Krishnan, “Automating War: The Need for Regulation,” *Contemporary Security Policy*, 30:1 (2009), 172-173.

⁹ Interview with Air Force UAS pilot, 29 November 2010. Interview conducted in confidentiality and the name is withheld by mutual agreement.

¹⁰ Robert M. Gates, *National Defense Strategy of the United States of America*, June 2008, 4.

¹¹ Charles J. Dunlap, Jr., Major General, USAF, retired. “Lawfare: A Decisive Element of 21st Century Conflicts?” *Joint Forces Quarterly* 54, 3rd Quarter 2009, 35 (Maj Gen Dunlap’s definition: “Lawfare is the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.”)

¹² Ibid.

success of these asymmetric methods influenced the United States to change military tactics. Recently, senior military officials testified before Congress that our “adversaries are likely to use ‘hybrid warfare’ tactics... across the full spectrum of conflict.”¹³ Hybrid warfare is defined as “conflict executed by either state and/or non-state threats that employ multiple modes of warfare to include conventional capabilities, irregular tactics, and criminal disorder.”¹⁴ Military officials believe this new classification of warfare is necessary because hybrid warfare is more potent than irregular warfare. It has increased “tempo, complexity, diversity, and wider orchestration across national borders which are all exacerbated by the ease with which adversaries can communicate, access international resources and funding, and acquire more lethal and sophisticated weaponry.”¹⁵

Current Capabilities

As of 2010, MQ-9 Reaper’s primary mission is to act as a “persistent hunter-killer for critical time-sensitive targets.”¹⁶ The integrated sensor includes an upgraded, high-resolution Synthetic Aperture Radar/Moving Target Indicator (SAR/MTI). In addition to improved capabilities of Air Force assets, the Army has redefined its UAS mission of the MQ-1C (Predator-class) Extended Range Multi-purpose (ER/MP) weapon, known as Gray Eagle. The Army’s current RQ-7B Shadow lifecycle upgrades added a designator payload allowing its

¹³ Davi M. D’Agostino, Director, Defense Capabilities and Management, U.S. Government Accountability Office in correspondence to the Honorable Loretta Sanchez, Chairwoman, House Subcommittee on Terrorism, Unconventional Threats and Capabilities, dated September 10, 2010, <http://www.gao.gov/products/GAO-10-1036R>. Accessed last September 23, 2010.

¹⁴ Ibid., at slide 18, “Hybrid Warfare Briefing to the Subcommittee on Terrorism, Unconventional Threats and Capabilities,” September 10, 2010; quoting U.S. Joint Forces Command, Joint Center for Operational Analysis briefing on “Joint Adaptation to Hybrid War.” (See the entire briefing for more definitions of hybrid warfare and hybrid threats.)

¹⁵ Ibid., at slide 17.

¹⁶ Department of Defense. *Unmanned Systems Roadmap 2009-2034*. Washington, D.C.: The Pentagon, April 2009, 67. Accessed last December 10, 2010: <http://www.aviationweek.com/media/pdf/UnmannedHorizons/UMSIntegratedRoadmap2009.pdf>

operators to conduct direct and indirect fires.¹⁷ The Army is retrofitting Apache and Kiowa cockpits with its new One System Remote Video Terminal (OSRVT). The OSRVT functionality allows pilots to receive Gray Eagle and Shadow full-motion video feeds and control their sensors from within their cockpits.¹⁸ Using UAS video data, these crewmembers are able to laser-designate targets with the same UAS aircraft.¹⁹ Therefore, a pilot, operating manned aircraft miles behind UAS aircraft, makes targeting decisions with less risk.

New Strategies in Air Power

As conventional air power tactics hindered the American military's objective to win the hearts and minds of the Iraqi and Afghan people, UAS strike missions proved extremely effective. The military's expanded use of this system overseas illustrates the increased significance of such aerial platforms to current and future military operations.²⁰ Accordingly, the 2010 Quadrennial Defense Review's (QDR) rebalances the military's weapon systems showing a bias toward an expansion of UASs. The QDR specifically recognizes the long-dwell UASs, such as the Predator and Reaper, as being invaluable for monitoring activities in "contested areas," improving situational awareness and security of our forces, and "targeting enemy fighters."²¹ It asserts the need for the Air Force to increase its capacity to operate round-the-clock combat air patrols to 50 sustained "orbits" by Predator and Reaper by 2011 and 65

¹⁷ Col Robert J. Sova, "TRADOC Capability Manager for Unmanned Aircraft Systems (TCM-UAS) Update," *Army Aviation*, November 30, 2010, 38.

¹⁸ Col Gregory B. Gonzalez and Lawrence Shelton, "Manned/Unmanned Teaming Operations: A Marriage Forged in Combat Finds a Home in the CAB," *Army Aviation*, November 30, 2010, 34.

¹⁹ *Ibid.*, at 35.

²⁰ Gerry J. Gilmore, "Unmanned Aircraft Take on Increased Importance," *Air Force News Service*, July 23, 2009.

²¹ Department of Defense. *Quadrennial Defense Review Report*. Washington, D.C.: The Pentagon, February 2010, 22. Available at <http://www.aviationweek.com/media/pdf/UnmannedHorizons/UMSIntegratedRoadmap2009.pdf>. For a brief review of the entire 2010 QDR, see Megan Scully, "Defense Review Urges 'more and better' Capabilities," *Congress Daily*, January 31, 2010. Available at <http://www.govexec.com>. Accessed last December 10, 2010.

“orbits” by 2015. In addition to the Air Force, the QDR tasks the Army to expand its UAS mission including the accelerated production of the Gray Eagle.

United States Military

Background

The legal authority of the armed forces is traced to Articles I and II of the United States Constitution. Specifically, Article I, Section 8 provides Congress power to raise and support Armies, maintain a Navy, and make laws. This language provides Congress a great deal of agility in organizing our nation’s military, resulting in various statutory laws to include the National Security Act of 1947. The National Security Act is codified throughout Titles 10, 32 and 50 of the United States Code.²² In accordance with Title 10 of the United States Code, the Department of Defense “shall maintain and employ Armed Forces to: Support and defend the Constitution of the United States against all enemies, foreign and domestic; ensure, by timely and effective military action, the security of the United States, its possessions, and areas vital to its interests; and uphold and advance the national policies and interests of the United States.”²³

This paper focuses primarily on two branches of the military, the Army and the Air Force. The Army is responsible for land-based military operations. The National Security Act of 1947 created the Air Force, giving it the responsibility to organize, train and equip for prompt and sustained offensive and defensive air operations.²⁴ United States Code, Title 10 defines the purpose for the Air Force (§8062) and the Army (§3062) as the same:

²² LTC Kathryn Stone, “‘All Necessary Means’ - Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces,” Army War College, Carlisle, PA, 2003, 6-7.

²³ Department of Defense. *Functions of the Department of Defense and Its Major Components*. Department of Defense Directive 51001.1. Washington, D.C.: The Pentagon, August 1, 2002. Available at <http://www.defense.gov>. Accessed last December 10, 2010.

²⁴ *National Security Act of 1947*. Pub. L. No. 235, 61 Stat. 502 (1947).

- To preserve the peace and security, and provide for the defense, of the United States...;
- To support national policy;
- To implement national objectives;
- To overcome any nations responsible for aggressive acts that imperil the peace and security of the United States.

Today's Roles and Missions

The National Defense Strategy focuses the “central objective” of the military on “winning the Long War against violent extremist movements.”²⁵ The United States is waging a global campaign against al-Qaeda and its terrorist affiliates primarily in Afghanistan and Pakistan.²⁶ The National Security Strategy tasks the military in Afghanistan to target the insurgency, secure key population centers, and increase efforts to train the Afghan security forces.²⁷ During this conflict, the military shifted its focus to sophisticated weaponry with robotic platforms, utilizing armed UAS to target enemy fighters. While employing these weapon systems, our pilots do not deploy overseas or fly over a dangerous battlefield. They conduct their missions in daylight from their home station. After a hard day at the “office” killing several insurgents in foreign lands, the pilots must hit a switch, leaving it all behind, as they take their children to soccer and eat dinner with their families.²⁸

Until recently, the Air Force considered it essential that only combat-trained pilots operate Remote Piloted Aircraft (RPA). The distinction between RPA and UAV during this time

²⁵ Robert M. Gates, *National Defense Strategy of the United States of America*. Washington, D.C.: The Pentagon, June 2008, 7-8. The National Defense Strategy is pending an update to reflect President Obama’s 2010 National Security Strategy and the 2010 Quadrennial Defense Review. The National Military Strategy has not been updated since 2004.

²⁶ The White House. *National Security Strategy of the United States of America*. May 2010, 20. Available at www.whitehouse.gov/sites/default/files/rss.../national_security_strategy.pdf.

²⁷ Ibid. at 21.

²⁸ Interview with Air Force UAS pilot, 29 November 2010. Interview conducted in confidentiality and the name is withheld by mutual agreement. For a similar discussion involving CIA operatives, *see also* Scott Shane, “C.I.A. to Expand Use of Drones in Pakistan,” *New York Times*, December 3, 2009. Available at http://www.nytimes.com/2009/12/04/world/asia/04drones.html?_r=3. Last accessed September 23, 2010.

was important. The weapon system operated by the Army is referred to as an UAV rather than a RPA due to the enlisted operator not being a trained pilot. The insatiable demand for the Air Force to contribute more RPAs to the fight in Iraq and Afghanistan took its toll. Secretary Gates criticized the Air Force for not expanding its drone operations and replaced two general officers.²⁹ This dissatisfaction occurred despite the Air Force requiring its RPA pilots to spend over *four continuous years* in combat.³⁰ In order to satisfy the demand for drone warfare, the Air Force changed its policy by requiring its operators to be officers but not trained pilots. Additionally, the Army expanded its Gray Eagle missions with enlisted operators in a new location. Comprised of 128 soldiers and 12 air vehicles, the Gray Eagle company will conduct launch, recovery, and maintenance operations from Edwards Air Force Base in 2011.³¹

Central Intelligence Agency

Background

The CIA has been providing support to military operations for decades, originating with the creation of the Coordinator of Information (COI) around 1940.³² The COI's main objective was to work with existing navy and military intelligence units. After the Japanese surprise attack on Pearl Harbor in 1941, a need for a large-scale national intelligence organization became readily apparent.³³ The immediate result was the creation of the Office of Strategic Services (OSS). The OSS was to research and analyze information for the Joint Chiefs of Staff. Because of the leadership and determination of William J. Donovan, a lawyer and Army officer who

²⁹ Armin Krishnan, "Automating War: The need for regulation," *Contemporary Security Policy*, Volume 30, No. 1, 180.

³⁰ Interview with Air Force UAS pilot, 29 November 2010. Interview conducted in confidentiality and the name is withheld by mutual agreement.

³¹ Col Robert J. Sova, "TRADOC Capability Manager for Unmanned Aircraft Systems (TCM-UAS) Update," *Army Aviation*, November 30, 2010, 36.

³² Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 4th ed. Washington, DC: Congressional Quarterly Press, 2009, 12.

³³ *Ibid.*, 19.

retired as a major general, the OSS eventually grew into an independent, all-encompassing, national intelligence agency, the CIA.

Today's Roles and Missions

Since the CIA was established in 1947, it has been a key participant in every American conflict. At its creation, the CIA was given authority to conduct “special activities approved by the President” of the United States, including covert actions. Covert actions are defined in the National Security Act as “activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” In other words, covert action is employed overseas where the President seeks to influence events in ways that are plausibly deniable. One intelligence author succinctly compared covert actions to Carl von Clausewitz’s description of war: “[covert action] is the extension of politics by other means. It supplements, rather than supplants, other instruments of power.”³⁴ These covert actions are today recognized as paramilitary operations or “warlike activities.”³⁵ These operations are conducted by “secret warriors who form the sword-wielding arm of the U.S. Central Intelligence Agency,”³⁶ also known as the Special Activities (SA) Division. It is of the utmost importance to emphasize these CIA paramilitary operatives are conducting these missions with the knowledge and approval of the President of the United States. The president must sign an order approving the operation. This document, referred to as a “presidential finding,” states the approval for the requested operation is based on the “president’s *finding* that covert action is ‘necessary to support

³⁴ Roger Z. George & Robert D. Kline, *Intelligence and the National Security Strategist: Enduring Issues and Challenge*. Maryland: Rowman & Littlefield Publishers, Inc., 2006, 227.

³⁵ *Ibid.*, 463.

³⁶ *Ibid.*, 509.

identifiable foreign policy objectives of the United States.”³⁷ The Hughes-Ryan amendment to the Foreign Assistance Act of 1974 codifies this presidential finding requirement for covert actions. This Act prevents the CIA from spending appropriated money “unless and until” the president issues a finding that such operation is important to the national security of the United States. The Act also requires appropriate reporting to Congress but it does not specify the timing of the report. Currently, in accordance with the Intelligence Authorization Act of 1991, the description and scope of covert operations must be reported to Congress before the mission begins. The bottom line is that the responsibility for these CIA paramilitary operations is directly attributable to the president and done with the knowledge of the appropriate Congressional members.

Under the circumstances of hybrid warfare, it is logical that the president tasked the CIA to step up its covert missions by acquiring more lethal and sophisticated weaponry.³⁸ The response, according to the media reports, has been “the most aggressive operation the CIA has been involved in,”³⁹ utilizing drones to kill America’s most dangerous enemies.⁴⁰ Utilizing these weapon systems, covert actions no longer must take CIA operatives to faraway, unsavory places or even put them on the battlefield; they conduct their missions from Langley, Virginia:

³⁷ Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 4th ed. Washington, DC: Congressional Quarterly Press, 2009, 168.

³⁸ LTC Kathryn Stone, “‘All Necessary Means’- Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces.” Army War College, Carlisle, PA 2003, 1-2.

³⁹ Joby Warrick & Peter Finn, “CIA Director Says Secret Attacks in Pakistan have Hobbled Al-Qaeda.” *Washington Post*, Mar. 18, 2010, at A.01.

⁴⁰ Scott Shane, “C.I.A. to Expand Use of Drones in Pakistan,” *New York Times*, December 3, 2009. http://www.nytimes.com/2009/12/04/world/asia/04drones.html?_r=3. Accessed last September 23, 2010; *see also* Kimberly Dozier & Adam Goldman, “Counterterrorist Pursuit Team; 3000 Man CIA Paramilitary Force Hunts Militants in Afghanistan, Pakistan.” *Huffington Post*, September 22, 2010. http://www.huffingtonpost.com/2010/09/22/counterterrorist-pursuit-_n_734961.html. Accessed last September 23, 2010.

... [CIA] sharpshooters killed eight people suspected of being militants of the Taliban and Al Qaeda ... in a compound that was said to be used for terrorist training. Then, the job in North Waziristan done, the CIA officers could head home from the agency's Langley, Va., headquarters, facing only the hazards of the area's famously snarled suburban traffic.⁴¹

If the above account accurately reflects present-day battles, then surely, as discussed later in this paper, we need present-day rules of engagement.

Just War Doctrine

War is an ugly thing, but not the ugliest of things. The decayed and degraded state of moral and patriot feeling which thinks that nothing is worth war is much worse.

--John Stuart Mill

Historical Perspective

Carl von Clausewitz defined war as “an act of force to compel our enemy to do our will.” The most successful act of force is violence projected by means of a military nature. The more powerful the nation's military, the greater the resources and sophistication of weaponry. A nation with powerful political objectives and a powerful military make for a powerful adversary—those same attributes make the nation a target of state and non-state actors. The doctrine of just war is generally thought of in terms of *jus ad bellum* and *jus in bello*. Analysis of *Jus ad bellum* involves the justification for waging war with particular emphasis on the political objectives sought. In simple terms, if the cause is just, then so is the right to resort to

⁴¹ Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killings*, William Mitchell Legal Studies Research Paper No. 2010-14, June 2010, *quoting* Scott Shane, “C.I.A. to Expand Use of Drones in Pakistan,” *New York Times*, December 3, 2009. Available at <http://www.nytimes.com/2009/12/04/world/asia/04drones.html>. Accessed last September 23, 2010.

war if there is no peaceful alternative.⁴² The remaining requirement for the doctrine of just war and the focus of this paper, *jus in bello*, is the just *conduct* of the war. The international community, recognizing that not only is war inevitable, it is sometimes justified, created rules of war to minimize human suffering. These international rules of war, also referred to as law of armed conflict, govern how to fight a just war. Although domestic law is an influencing factor, the law of armed conflict derives primarily from customary international law, formal treaties, and international agreements.

Application of the Law of Armed Conflict

The body of law recognized as law of armed conflict is commonly referred to as international law within the Just War Doctrine. The legal distinctions between international law, law of war and international humanitarian law have blurred over the years.⁴³ While lawyers and philosophers disagree on the number of principles of the law of armed conflict, this paper addresses discrimination and proportionality. The law of armed conflict supports the current operation of drones when conducted by combatants, i.e. members of the United States military. The legality of these drone operations when conducted by the Central Intelligence Agency is controversial primarily because of the civilian operators. The operators' status is discussed later in this paper. However, in both instances, drone warfare satisfies the principles of discrimination and proportionality of the just war doctrine. Discrimination, also referred to as the principle of distinction, is the principle that civilians must be distinguished from those fighting their nation's war.⁴⁴ This distinction, derived from customary international law,

⁴² Jus ad bellum is not simple. For a detail discussion of this topic see Kimberly A. Hudson, *Justice, Intervention, and Force in International Relations: Reassessing Just War Theory in the 21st Century*. New York: Routledge, 2009.

⁴³ For the purposes of this paper, these terms are used interchangeably.

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, (Protocol I), Article 48.

eventually evolved into two classifications: combatants and civilians or noncombatants.⁴⁵ It is unlawful to intentionally target civilians “unless and for such time as they take a direct part in hostilities.”⁴⁶

Just War theorists understand the challenges in fighting insurgents who are indistinguishable from noncombatants. In his book, *Just Wars*, Alex Bellamy describes the modus operandi of terrorists and their supporters as manipulating the moral and legal restraints observed by the United States to further their own cause.⁴⁷ The local population provides these terrorists a great deal of support. They conceal themselves among the civilian population and do not hesitate to use mosques as storage sites for their weapons and conduct their operational planning.⁴⁸ Under these circumstances, discrimination is very difficult. Without the means for successful discrimination, proportionality is impossible. Despite understanding these challenges, Bellamy, like Michael Walzer, insists it is not enough simply to avoid the deliberate targeting of civilians but that combatants must do “everything possible to minimize the likelihood that non-combatants will be harmed” even if it puts greater risk on themselves.⁴⁹ Under this view, the logical assumption then is a civilian life is worth more than the life of the person wearing a military uniform. This paper considers this conclusion to be an expansive view of discrimination and contrary to the Geneva Conventions. Military commanders may have other reasons to put their soldiers’ lives at greater risk in order to protect the local civilian population but they are not required legally or morally to do so. While the military cannot intentionally target civilians, it

⁴⁵ LTC Mark D. Maxwell. “The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?” *Military Review*, September-October 2004, 18, n20.

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, (Protocol I), Article 48.

⁴⁷ Alex Bellamy, *Just Wars: From Cicero to Iraq*. Cambridge: Polity Press, 2006, 180. See also Bruno Coppieters and Nick Fotion, *Moral Constraints on War: Principles and Cases*. 2nd ed. Maryland: Lexington Books, 2008, 172-173.

⁴⁸ Coppieters, *supra* note 47 at 184.

⁴⁹ Bellamy, *supra* note 47 at 181, 183. See also, Michael Walzer. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. HarperCollins, 1992, 155.

intentionally targets objects, such as buildings, with proper justification. Within discrimination is the principle of military necessity⁵⁰ which limits targeting to “those objects which by their nature, location, purpose, or use make an effective contribution to military action” and whose destruction or capture offer a “definite military advantage.”⁵¹

Drone warfare allows the United States to minimize targeting mistakes without risking the lives of its operators. The drone is able to provide real-time video feed of the target to the operators before they make the decision to fire. The operators will be able to crosscheck the information from this video feed to the intelligence report ensuring a greater probability of target verification. Target verification should not be confused with target selection. Target selection occurs well before a drone strike. Under most circumstances, target selection lists are approved only after consultation with lawyers who have expertise in operational and international law. While this process protects against targeting noncombatants, it does not mean civilians are not killed during a drone attack. A drone strike, like any aerial bombing, has the double effect⁵² of killing not only the enemy but also civilian bystanders.

Drone warfare gives the operators an accurate and timely site picture of the target and surrounding area. Therefore, they are more likely to know the number of noncombatants intermingled among the military targets. Using the important principle of proportionality *jus in bello* found in Article 57(2)(iii) of the 1977 Geneva Protocol I, operators must make a determination that the value of the target outweighs the cost of civilian life and property that will be destroyed along with the target. While morally, many believe this balancing test is an impossible task, it must be done. The anticipated collateral damage cannot be excessive in

⁵⁰ This paper recognizes the Principle of Military Necessity is considered a separate and distinct principle by most Just War theorists. However, by its very nature, it falls under the discussion of Discrimination in this paper.

⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, (Protocol I), Article 52.

⁵² See Michael Walzer. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 2nd ed. HarperCollins, 1992, 151-159 for a detailed discussion of the double effect, a principle of the just war doctrine.

relation to the military advantage anticipated. In these scenarios, it must be determined that the death or destruction of the target will save a larger number of lives than the number of lives lost in the strike. Drone operators are not killing these terrorists in order to protect the military against lethal attacks. These terrorists have set the goal of killing large numbers of civilians. Removal of high value al-Qaeda targets from the “battlefield,” dramatically affects the mission planning and operations for that particular terrorist cell.

It is incorrect to assume there are no risks in drone warfare under the proportionality principle. Specifically, the operators’ locations or military installations in the United States are vulnerable to reprisal attacks. While it is not clear at this point, how serious this threat may be, it is a matter for consideration.⁵³ Furthermore, the operators do suffer from post-traumatic stress disorder symptoms in greater numbers than traditional combat pilots. These UAS operators are exposed to horrific post-attack images as the drones hover over the site in contrast to the fighter pilot who drops his payload and then returns to base without immediately seeing the images of death and destruction.

Status Under International Law

A combatant is one who has the “right to participate directly in hostilities.”⁵⁴ Active participation in hostile actions includes any action causing actual injury to personnel and destruction of equipment belonging to the enemy armed forces.⁵⁵ Members of the armed forces are combatants and may directly engage the enemy in hostile actions. International law finds it

⁵³The car bombing of Captain William C. Rogers, III, former Navy Commander of USS Vincennes, in March 1989 is believed to be in reprisal for his ship accidentally shooting down the Iranian airbus killing 290 civilian passengers.

⁵⁴ Article 42(2) of the Additional First Protocol of 1977 to the Geneva Conventions of 1949 (further guidance is given in Article 43). The United States has not ratified the Additional First Protocol of 1977, however, these Articles are considered customary international law. See LTC Mark D. Maxwell. “The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?” *Military Review*, September-October 2004, 17, n4.

⁵⁵ Maxwell, *supra* note 54 at 18, n20.

extremely important to distinguish between civilians and combatants. The laws of war protect civilians only when this distinction is clearly observed. Geneva Conventions make this distinction so that parties to a conflict will direct their operations against military and not civilian objectives. This distinction is also important because it confers certain protections to lawful combatants. These protections include such matters as prisoner of war status and immunity from prosecution of war crimes. The definition and usage of the terms noncombatant and unlawful combatant have evolved over the years. For instance, a discussion of these terms can be found in Air Force Operations and the Law: A Guide for Air and Space Forces (2002). On page 30, it states:

Generally, anyone who is not a combatant is a non-combatant However, some persons may become *unlawful combatants*. An unlawful combatant is an individual who is not authorized by a state that is party to a conflict to take part in hostilities but does anyway. The term is also used to refer to otherwise lawful combatants who do not comply with identification requirements such as dress or the open bearing of arms, to military noncombatants (e.g., medical personnel) who improperly abuse their protected status by engaging in hostilities, and even to mercenaries. Unlawful combatants may be attacked while engaging in combatant acts and may be tried and punished under national law for their violent acts.

In applying the definition of unlawful combatants above to CIA operatives, the gray issues only become grayer. While these operatives are not part of the armed forces that are legally permitted to engage the enemy militarily, it cannot be said that the United States has not “authorized” the CIA to take part in hostilities, nor would the CIA operatives be punished under domestic law for any action approved by a presidential finding. Regardless of the source of the definition used for unlawful combatants, it is widely accepted that international law does not sanction these CIA covert missions.⁵⁶ These operatives, with their greatly varied dress in the field and lethal weapons, do not expect immunity for their warlike activities even if captured by a state-actor.

⁵⁶ Peter M. Cullen, “The Role of Targeted Killing in the Campaign against Terror,” *Joint Forces Quarterly* 48, 1ST Quarter, 2008, 22.

They do not expect the United States to come to their defense formally or even publicly recognize their plight no matter how grave. Until recently, at least for the most part, their missions, no matter how victorious or disastrous, went as designed, unnoticed by Americans as well as the international community.

The time has come for the international law community to recognize a third classification to the principle of distinction: quasi-combatant. This term should apply to CIA operatives when: they are engaging in direct hostilities with an enemy of the United States; apprehension through international law enforcement methods is not possible; and the President of the United States or a specific combatant commander to whom the President delegated his approval authority has approved these CIA operations. Additionally, all CIA officers must receive law of armed conflict training at least annually. The term “quasi-combatant” is not new. In the past, commentators have recognized the limitations of the term “combatant” when desiring to distinguish between civilians and civilians who accompany the force supporting the military in overseas operations.⁵⁷ During the drafting of the 1977 Additional Protocol, the proposal for a quasi-combatant status was specifically rejected.⁵⁸ The authors rejected the term over concerns of granting an individual a combatant status while he is engaging in combat action and the status of a civilian at all other times.⁵⁹ However, Reserve and National Guard members transit from combatants to civilians without issue. Now more than three decades later, members of the

⁵⁷ LTC Mark D. Maxwell. “The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?” *Military Review* September-October 2004, 19.

⁵⁸ Ibid.

⁵⁹ “All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of ‘quasi-combatants,’ which has sometimes been used on the basis of activities related...with the war effort...Any interpretation which would allow combatants as meant in Article 43 to “demobilize” at will in order to return to their status as civilians and take up their status as combatants once again, as the situation changes or as military operations may require, would have the effect of cancelling any progress that this article has achieved.” International Committee of the Red Cross Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 515 (Y. Sandoz, C. Swinarski, B. Zimmerman, eds, Geneva, 1957) Commentary to Protocol I.

international law community are once again asking themselves whether the “law of war is suited to today’s conflicts.”⁶⁰ Unrelated to drone operations, members of the international law community, recently coined a new phrase to distinguish between civilians and combatants in International Humanitarian Law (IHL).⁶¹ This term, adopted by the assembly of the International Committee of the Red Cross (ICRC), was introduced under IHL in the Interpretive Guidance on the Notion of Direct Participation in Hostilities. One of the purposes of the Interpretive Guidance is to provide recommendations concerning the interpretation of IHL. While only a competent judicial forum can formulate a legally binding interpretation of international law, the goal of the ICRC is that “the comprehensive legal analysis and the careful balance of humanitarian and military interests underlying the Interpretive Guidance will render the resulting recommendations persuasive for States, non-State actors, practitioners, and academics alike.”⁶²

An update to the law of armed conflict accounting for hybrid warfare is necessary. UAS operators, whether they are military or civilian, are not even on the battlefield. Most important to the international law community should be transparency and accountability of this weapon’s target selection and verification process rather than the distinction of its *off-the-battlefield* operators. Furthermore, hybrid warfare comes with unsustainable financial costs. With costs in excess of \$400 million a day,⁶³ the United States will continue to use all available means to defeat its adversaries as quickly as possible to include the CIA paramilitary force. A favorable recommendation of CIA’s paramilitary activities as a lawful arm of the United States

⁶⁰ Jakob Kellenberger, “Is the Law of War Suited to Today’s Conflicts?” Article on interview given on September 21, 2010. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-development-interview-210910>. Accessed last September 26, 2010. Also available on www.icrc.org website under “highlights.”

⁶¹ *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, 991 (the term was called a “person engaged in a continuous combat function.”) Also available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/\\$File/irrc-872-reports-documents.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irrc-872-reports-documents.pdf).

⁶² *Ibid.*, 992.

⁶³ David Kilcullen, *The Accidental Guerrilla*, (New York: Oxford University Press, 2009), 25.

government by the ICRC would be a major accomplishment. The eventual goal is to provide a lawful umbrella covering CIA officers' direct participation in hostilities recognized not only domestically but also internationally.

Conclusion

As conventional air power tactics hindered the American military's objective to win the hearts and minds of the Iraqi and Afghan people, UAS strike missions proved extremely effective. Its persistent flight and target capability exemplify air power and its expanded use overseas demonstrate the increased importance of these aerial platforms to current and future military operations. The drone operators' environment is conducive to making the best possible targeting decisions in battle. While these decisions will never be perfect, they are not made in the "heat of battle" where the lives of the decision-makers' and their troops are in grave danger. The law of armed conflict supports the operation of drones when conducted by combatants, i.e. members of the United States military. The legality of these drone operations when conducted by the Central Intelligence Agency (CIA) is controversial primarily because of the noncombatant status of the CIA operatives. In both instances, however, drone warfare satisfies the principles of discrimination and proportionality of the just war doctrine.

The CIA has been supporting identifiable foreign policy objectives of the United States for more than fifty years. Covert actions are conducted with the knowledge and approval of the United States President. Yet, the United States has "not resolved the basic rules of engagement for covert forces in the world today."⁶⁴ Taking the appropriate steps toward granting CIA operatives who directly engage in hostilities a legal status under international law should be a

⁶⁴ R. Jeffrey Smith & Joby Warrick, "Blackwater Disclosure adds to CIA Worries," *Washington Post*, August 21, 2009, *quoting* Porter J. Goss, former CIA Director from 2004 until 2006; http://www.washingtonpost.com/wp-dyn...004064_pf.html. Accessed last September 28, 2010.

priority for the White House. It is clear that today's conflicts with hybrid threats continue to require "all necessary means" and that includes covert actions involving sophisticated weapons. Previously, the international law community has recognized classifications in addition to the original terms of "combatant" and "civilian." It is time to recognize a quasi-combatant status for operatives engaging in direct hostilities only after approval of a president of a country whose military members and civilians follow the doctrine of just war.

Due to the success of drone warfare, we can expect the United States to continue its current missions and eventually expand the use of drones to other areas. Although not discussed in this paper, two such areas ripe for expansion involve drug trafficking in Mexico and piracy off the coast of Africa. The legality of these operations will depend mostly upon law enforcement rules for the use of force in an international environment rather than rules of engagement pursuant to the law of armed conflict.

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